Supreme Court, U.S.
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Case No. _____

In The Supreme Court Of The United States

October Term 1994

RONALD BRANSON,

Petitioner

vs.

ALAN B. HABER,
in his personal capacity only,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Sept. 28, 1994

QUESTION PRESENTED FOR REVIEW

Whether the U.S. Supreme Court should now intervene and address for the first time in this case petitioner's protected liberty and property interests created by California Code of Civil Procedure Section 585 subdivision (b) in order to determine the need for federal injunctive relief.

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REFERENCE TO OFFICIAL/ UNOFFICIAL REPORTS OF OPINIONS

United States Reports
Supreme Court Reporter
Lawyers' Edition Reports, 1st & 2nd Series
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GROUNDS FOR JURISDICTION

(1) The final opinion sought to be reviewed was filed May 13, 1994; rehearing was denied July 12, 1994.

(2) The statutory provision which confers jurisdiction on this Court to review the final opinion is Title 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Constitutional Provisions:

Article III, Section 1
Article III, Section 2, Clause 1
Due Process Clause of the Fourteenth Amendment

Federal Statutes:

28 U.S.C. § 636(b)(1)
28 U.S.C. §1254(1)
28 U.S.C. §1343(a)(3)
42 U.S.C. §1983

Federal Rules of Appellate Procedure:

Rule 3(e)
Rule 4(a)
Rule 28(a)(2) *[now Rule 28(a)(3)]*

Federal Rules of Civil Procedure:
Rule 59(e)

Central District Rules:
Local Rule 7

California Statutes:
Code of Civil Procedure Section 585 subd.(b)
Code of Civil Procedure Section 632

California Rules of Court:
Rule 232

California Constitution:
Article VI, Section 19 *[Pertinent texts are set forth in the Appendix]*

STATEMENT OF THE CASE

Petitioner herein is referred to as "plaintiff" to conform to the record. "CR" is clerk's record; "ER" excerpts of record on appeal; "OB" opening brief; "AB" appellee's brief; "RB" reply brief; "MEM" Court of Appeals decision; "REH" petition for rehearing; "C/A" Court of Appeals.

On June 12, 1992, Case No. CV 92-3544-LGB was filed in United States District Court for the Central District of California, invoking jurisdiction under Title 28 U.S.C. §1343(a)(3) [ER 1/2:23-28] seeking prospective injunctive relief under Title 42 U.S.C. §1983 against a state judge, within the meaning of *Pulliam v. Allen* (1984) 466 U.S. 522, for the deprivation by state action of a constitutionally protected interest in life, liberty and property ***without due process of law***, as established by *Parratt v. Taylor* (1981) 451 U.S. 527, and more specifically described as the ***third category of protection*** under the Due Process Clause of the Fourteenth Amendment in *Daniels v. Williams* (1986) 474

U.S. 327, 338-9 and *Zinermon v. Burch* (1990) 110 S.Ct. 975, 983. [ER 1/2:12-19; OB 3:17-25].

Plaintiff (petitioner herein) alleged that on October 8, 1991, seven weeks after defendant had taken plaintiff's prove-up evidence under submission for default judgment on August 21, 1991, said defendant ***removed the evidence from submitted status***, thereby violating California Code of Civil Procedure §585(b), mandating him to render default judgment after submission of the evidence by the court. There is no authority under California law for removal of such evidence taken under submission for judgment, nor does defendant cite any. [ER 11/31:11-24; OB 12:9-16]. It is ***that removal of evidence*** in violation of CCP §585(b) which plaintiff alleges "depriv[ed] plaintiff of a constitutionally protected interest in life, liberty and property ***without due process of law***, ..." [ER 1/6:10-28; OB 4:4-7] which is the ***federal violation*** under federal standards of due process that has **not** been addressed by either the District Court or the Court of Appeals. [OB 26:9-16; RB 5:4-10].

Plaintiff alleged exhaustion of state remedies, showing inadequate remedy at law [ER 1/8:18-10:17]; and irreparable harm and injury, in that plaintiff's underlying state tort action is being held in perpetual limbo, since according to law plaintiff is unable to proceed to finality unless and until the required default judgment is entered, ***-[COMPARE THIS STATEMENT WITH THE COURT OF APPEALS' DECISION]-*** thus enabling an appeal in state court to be taken in the normal course of state law. [ER 1/10:19-11:12; OB 4:8-14]. The complaint specifically alleges "Plaintiff has suffered great and immediate irreparable harm and injury and is immediately in danger of suffering further irreparable harm and injury in the loss of his constitutional rights as a proximate result of the acts and omissions of defendant HABER herein alleged, in that his state tort action ... is currently being held in a perpetual state of limbo in the state Superior Court by defendant HABER's failure to carry out state statute as

aforesaid; according to law, plaintiff is unable to proceed with his state tort action without waiving the statutory right to default judgment after trial; the way is not open to proceed to finality unless and until default judgment is rendered and entered as required by law so that appropriate post-judgment action can be taken in the normal course of law, such as an appeal." [ER 1/10:21-11:7; see also OB 10:20-25].

Despite that specific allegation in the complaint and statements in the opening brief, defendant argued on appeal that the complaint was properly dismissed because "Branson has not alleged any serious risk of irreparable harm that `is both great and immediate' nor demonstrated that this is one of those `really extraordinary causes' for which rare federal injunctive relief directed at state court judges is reserved." [AB 9:5-9]. Such argument does not respond to the issues on appeal [RB 7:20], nor is it a proper basis for immediate dismissal [OB 31:19-23] but is merely an affirmative defense bringing the allegation into debate [RB 7:20-22] entitling plaintiff to offer evidence to prove his allegations [OB 32:6-13].

Plaintiff's right to offer evidence in support of his allegation that the "underlying state tort action is being held in perpetual limbo ... unless and until the required default judgment is entered" [OB 4:10-12] was further violated by the Court of Appeals when it based its ruling on premature and arbitrary conclusions without proof that the state court action is ***"on-going"*** [MEM 1:19; 2:3]; that the case would require federal "intrusion" (apparently meaning interruption of an ongoing case) of the state proceeding [MEM 2:11-12]; and that the defendant set aside a default judgment [MEM 1:18] --none of which is true according to the allegations of the complaint. Plaintiff demanded that in the spirit of the Federal Rules the C/A cite the authority and evidence in support of those conclusions. [REH 3:11-27]. How did the C/A respond? ***Rehearing denied 7/12/94***. The judicial fiat still stands without resolution!

Plaintiff alleged the necessity of federal injunctive relief in order to enforce the state tort remedy in the state action and the constitutional protections guaranteeing his right to adequate state procedures for redressing the alleged deprivations under state tort law. [ER 1/12:5-13; OB 4:14-18]. Plaintiff stated on appeal that the following questions were left open and unresolved: What authority did defendant have to remove the trial (i.e., the evidence) from submitted status? Why was it still on "submitted status" on October 8, 1991? After having had all the evidence taken under submission by the court at the conclusion of default trial, why must plaintiff later be deprived of that submission and subsequent judgment? Does a §473 motion to set aside a default destroy established rights to default judgments under §585(b) and statements of decision under §632 of the California Code of Civil Procedure? [ER 11/31:11-24; OB 12:9-15] --these questions showing that dismissal of the complaint was not a foregone conclusion. Plaintiff stated that as established by *Scheuer v. Rhodes* (1974) 416 U.S. 232, the primary question presented is whether the District Court acted prematurely and hence erroneously in dismissing the complaint, thus precluding opportunity for plaintiff by subsequent proof to establish a claim. [ER 25:5-8; OB 32:2-5]. The issue is whether plaintiff (the claimant) is entitled to offer evidence to support the claims. [ER 25:12-13; OB 32:9-10].

In order to obtain the relief necessary for a judicial remedy in the state action, plaintiff asked the federal court for the following: (1) Order the removal of the defendant judge from Case No. NWC 30307; (2) Order an unbiased and impartial judge to proceed as required under (a) CCP §585(b), (b) CCP §632, (c) Rule 232 CRC (California Rules of Court), and (d) Article VI, Sec.19 of the California Constitution; (3) For costs of suit; and (4) For such other and further relief as the court deems proper. [ER 1/12:17-13:16; OB 4:19-25].

As a matter of "comity and federalism" the only requirement for this federal suit for injunctive relief is the

exhaustion of state remedies; see *Huffman v. Pursue, Ltd.* (1975) 420 U.S. 592, 604. [ER 11/10:16-21; OB 11:20-23]. Plaintiff exhausted all state remedies available to him without a judgment, being deprived of the statutory right of appeal from judgment by virtue of defendant Haber refusing to render the default judgment required by law. [ER 1/10:12-17; OB 10:16-19]. There is no final judgment or decree in the underlying state tort action. [ER 11/10:15-16; OB 11:18-19]. Despite that discussion in the opening brief with references to the record, the C/A decided "federal courts should refrain from issuing an injunction as a matter of comity" because of "ongoing state judicial proceedings." [MEM 2:3-5]. Not only does that decision conflict factually with the allegations of the complaint and the opening brief, it has nothing to do with the issues presented for review in the opening brief, principally the first issue regarding CCP §585(b). [OB 1:1-5].

Defendant's "summary" of plaintiff's case in the motion to dismiss is a complete misrepresentation of this suit for injunctive relief, and the conclusion that the district court lacks subject matter jurisdiction is based upon those misrepresentations. [ER 11/3:13-17; OB 11:11-14]. Additionally, the district court misused and abused its power to take judicial notice in order to conceal and evade the subject matter of plaintiff's claim. [ER 25/9:20-10:1; OB 12:17-19]. In contrast to the *Rodic* case cited by the magistrate [615 F.2d 736], the district court seized upon the opportunity, as presented by defense counsel, to arbitrarily take judicial notice of matters ***irrelevant*** in order to ***thwart*** "an adequate understanding of [plaintiff's] case" (*Rodic* p.738). By so doing, the district court made at least fourteen (14) irrelevant "findings" upon which it based its decision. [ER 25/10:5-11:28; OB 12:20-24]. Plaintiff requested findings of fact and conclusions of law on the issue of subject matter jurisdiction, and the district court failed and refused to make them. [ER 11/21:1-2; ER 25/2:12-13; OB 12:25-27]. The district court failed to make findings on thirty-five (35) factual allegations (showing page and line

references to the complaint in each instance). [ER 25/3:17-7:18; OB 12:28-13:1]. The district court also made ***false findings*** without references to the complaint (listing the 15 false statements with page and line references to the court's decision in each instance). [ER 25/7:26-9:15; OB 13:2-4]. Despite this showing on the record regarding the lack of factual findings by the district court, the C/A based its decision on ***false statements and conclusions*** as aforesaid, rather than remand the case to the district court for findings based on evidence citing the record. See REH 4:20-26 specifically pointing this out to the C/A.

The removal of defendant Haber from future conduct of plaintiff's case is ancillary to the prospective injunctive relief being sought in federal court, as briefed by plaintiff. [ER 22/12:20-13:8; ER 25/24:10-13; OB 13:5-7]. Despite that argument made on the record and in the opening brief, defendant calls it "disqualification proceedings" [AB 10:11-26] in conflict with the facts and law to the contrary shown in the record. There is no discussion by defendant of the "ancillary effect" of injunctive relief in plaintiff's case which has been thoroughly briefed on appeal. [OB 29:12-31:18; RB 9:15-21]. Instead of ordering findings by the district court on this matter, the C/A, on its own, made the deceptive statement "Here, Branson's request for injunctive relief sought to recuse Judge Haber from Branson's state court action and to have an impartial judge appointed who could render a default judgment in Branson's favor." [MEM 2:7-10]. The record shows that plaintiff did **not** seek "to recuse Judge Haber" but rather sought his removal from the case ***as part of the injunctive relief,*** a discussion thoroughly made on the record supported by legal authority --but ignored by the courts. Nevertheless, it doesn't relate to the issue on appeal pertaining to plaintiff's federally-protected statutory right to "a default judgment in Branson's favor" and Haber's ***removal of that right without the required hearing under federal standards***.

Plaintiff argued on appeal "Each of our due process cases has recognized, either explicitly or implicitly, that because `minimum [procedural] requirements [are] ***a matter of federal law,*** they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action.' (citations).... [T]he adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed ***in constitutional terms.*** (citations)." (emph. added) *Logan v. Zimmerman Brush Co.* (1982) 455 U.S. 422, 432. Thus, according to *Logan*, it makes no difference whether "the judge interpreted the [state] law as permitting him to set aside the default" in plaintiff's case. [ER 24/3:25-26; ER 25/26:17-18; OB 18:22-19:9, 13:11-13, 33:2-3]. Despite the fact that the record fully discloses that this federal suit is about violations of ***federal law*** and **not** state law, defendant argued on appeal "[T]he District Court here concluded that in any event the state court trial judge (i.e., the defendant) acted correctly and lawfully ***under state law***" (emph.added), and then quoted a portion from the Final Report and Recommendation of the Magistrate, citing "ER Tab 30 p.2, lines 13-14" [AB 9:22-27], knowing that the document ***immediately following that one*** in the Excerpts of Record (ER) is the separate Notice filed by plaintiff [ER 27], challenging that Final Report as being false and fraudulent, pointing out in depth, citing the record, the lies and deception contained in that Final Report.

Defendant and the district court were ***placed on notice*** of the fraud perpetrated by the district court, each point thereof being followed by a detailed explanation, quoting from and citing the record extensively ***showing evidence of the fraud in writing***. The portion relied on by defendant on appeal, i.e., Final Report 2:13-14 [AB 9:27] is covered in the Notice at ER 27/3:24-4:22, starting with "The final report discussing the [state defendants'] `motion to vacate default judgment' [Final Report 2:13-23] ***without discussing*** plain-

tiff's federally protected property interests as alleged on the face of the complaint makes this entire federal process meaningless!" (emph.in orig.) [ER 27/3:24-27]. In conclusion that Notice states in full caps: "PLAINTIFF DEMANDS THAT THE MAGISTRATE RULE ON PLAINTIFF'S FEDERALLY PROTECTED PROPERTY INTERESTS, CONFERRED BY STATE LAW, AND ADJUDICATE THE MINIMUM PROCESS THAT WAS DUE IN VINDICATION OF THOSE PROPERTY INTERESTS" [ER 27/4:23-26] followed by "Plaintiff is ***not being heard*** on his federally protected property interests alleged in the complaint, and accordingly, the final report is not an adjudication of plaintiff's federal interests and it is `not entitled to respect in any tribunal.' (See *Windsor v. McVeigh* 93 U.S. 274, 277)." (emph.in orig.) [ER 27/5:1-5]. Nonetheless, that Final Report ***is being given respect*** by both lower courts herein, but the evidence of fraud and contempt is still there!

The "Order Adopting" [ER 28] states that the district court "hereby approves the ... Final Report and Recommendation of the United States Magistrate Judge and adopts the findings, conclusions, and recommendations therein" without addressing or acknowledging plaintiff's Notice challenging the Final Report on the basis of fraud. [ER 31/12:25-13:2]. There is no reference whatsoever to this Notice. [ER 31/13:7-8; OB 13:18-23]. On July 29, 1993 plaintiff filed the "Notice of False Statements Within Magistrate Edwards' Final Report Filed July 26, 1993 and Demand For Magistrate To Cite The Record Upon Which He Relies, and To Rule On Plaintiff's Federally Protected Property Interests." The same pattern of fraud, deceit and evasion is repeated by the C/A, where ***again*** false statements are made which form the basis for arbitrarily throwing out the case, even on appeal. There, too, plaintiff demanded that "the Court cite the authority and evidence from the record upon which it relies" in making its unwarranted and indeed ***false statements***. [REH 3:11-14]. In neither instance

were those false statements corrected or supported by factual evidence from the record.

The district judge disregarded plaintiff's Objections [ER 25] which were re-presented to the district court specifically requesting the required *de novo* determination thereof in a post-judgment Motion To Alter or Amend and Vacate as Void The "Judgment" and The "Order Adopting" etc. under Rule 59(e) FRCvP. [OB 13:26-28]. The topics of the motion are (1) There is no evidence of de novo review; (2) Judgment disregards "Notice of False Statements"; (3) No indication of type of dismissal applied; (4) Judge Baird disregarded plaintiff's Objections; (5) No findings to support dismissal; (6) Proposed amended complaint was disregarded; (7) Judge Baird has disregarded plaintiff's right to offer evidence in support of his claim; (8) Judge Baird has disregarded plaintiff's property interest; (9) Judgment is a block to the exercise of federal jurisdiction. [ER 31, Table of Contents].

The 59(e) motion filed 8/18/93 is based on ***eighteen (18) grounds.*** [ER 31/pp2-3; OB 6:10-12]. The final order of the district court denied the 59(e) motion on only the "de novo review" ground stating: "This Court made a de novo review of the magistrate's R&R regarding defendant's 12(b) motion, and of plaintiff's objections, before entering judgment dismissing plaintiff's claim. ***There is nothing more for this Court to consider.*** Thus, plaintiff's Fed.R.Civ.P. 59(e) motion to alter or amend judgment is DENIED." (emph.added) [ER 52/8:2-7].

The primary purpose of the 59(e) motion, of which plaintiff gave specific notice in that motion, was to ***have oral argument*** in district court since the case was so mutilated and misrepresented by the court, and to ***obtain a reporter's transcript of the proceedings*** for (1) clarifying the type of dismissal, the specific findings on which the dismissal is based, how the judgment reflects plaintiff's Objections to the magistrate's report, and how the district court applied its

consideration of those Objections before making its final decision; and (2) setting forth on the record a reasoned response to the Objections and to the grounds of the Rule 59(e) motion which will disclose to the parties and to a reviewing court the basis of the decision. [ER 31/4:1-16; OB 6:13-21]. The final order takes none of that into consideration. [ER 52].

The case was even more complicated by extensive interference in post-judgment proceedings by the magistrate, by routinely taking plaintiff's post-judgment motions off calendar, even though the motions were set on the district judge's calendar and addressed to her attention. Because of the magistrate's interference, plaintiff was compelled to file a motion (1) for an order to show cause why the magistrate should not be held in contempt for interfering with proceedings of the district court; (2) to reschedule the Rule 59(e) motion for hearing and oral argument before the district judge on the grounds that the magistrate's orders are void and nullities in violation of Article III of the U.S. Constitution, Title 28 U.S.C. §636(b)(1), Rule 59(e) FRCvP, and Local Rule 7 Central District Rules; and that the magistrate's unauthorized interference with the motion procedure and usurpation of power has violated plaintiff's right to due process of law and has caused needless delay and confusion to plaintiff's prejudice and injury in halting and blocking the presentation and hearing of his Rule 59(e) motion. [OB 7:5-21].

The district judge signed the final order which (1) ***denied*** plaintiff's motion for OSC as to why the magistrate should not be held in contempt [ER 52/7:1-4]; most egregiously in depriving plaintiff of the right to be heard on the facts (2) ***denied*** plaintiff's Rule 59(e) motion without oral argument [ER 52/8:6-7] and ***denied*** having it rescheduled for hearing and oral argument [ER 52/8:12-13] --that denial shattered the entire case --the truth would never be adjudicated from then on; (3) ***denied*** plaintiff's motion for

sanctions [ER 52/9:17] and ***denied*** having that motion placed back on calendar for hearing [ER 52/10:1-3]. ***RESULT:*** A close-out of federal relief and continuing lack of a remedy and legal conclusion in the underlying state tort action. [See ER 1/10:21-11:7; 12:7-13]. [OB 8:8-17].

On appeal, the point made by plaintiff in reply to the appellee's brief which supersedes all of appellee's arguments is that defendant ***isn't addressing the issues raised on appeal.*** "1. Appellee's brief fails to address plaintiff's issues on appeal" [RB 1:11] and "2. Neither of the arguments made in the [AB] interfaces with, or disposes of, plaintiff's issues on appeal." [RB 7:1-2]. The literal ***bottom line*** of the RB states "The issues on appeal presented by plaintiff must be addressed" [RB 11:10], dated and signed. Then what does the C/A do? It, too, "fails to address plaintiff's issues on appeal", calling into question its jurisdiction to act outside the scope of the appeal.

While ignoring and evading the issues on appeal, and despite the record before it, the C/A decided "[W]here the injunctive relief requested would require the federal court to supervise ongoing state judicial proceedings, federal courts should refrain from issuing an injunction as a matter of comity" citing *Pulliam* and *Younger v. Harris* [MEM 2:2-6]. It stated further "Because the relief Branson requests would require a federal court to intrude too far into a state court's judicial proceeding, the district court properly dismissed his action" again citing *Pulliam*. [MEM 2:10-13]. Challenging that decision, plaintiff stated in his petition for rehearing "Plaintiff affirms and states that at no time has he ever alleged that Alan Haber violated his constitutional rights ***by setting aside a default judgment.*** There is no support within this record that the underlying state action ***is ongoing.*** The evidence supports a contrary conclusion." (emph.added) [REH 4:1-5]. Rehearing was denied; the fiat still stands.

ARGUMENT

The U.S. Supreme Court should now, under the circumstances, intervene and address for the first time in this case petitioner's protected liberty and property interests created by California Code of Civil Procedure Section 585 subdivision (b) which is required to determine the necessity for federal injunctive relief.

The final words of plaintiff's opening brief on appeal are (adapting the guidelines of *Scheuer v. Rhodes* (1974) 416 U.S. 232 at 250): "The documents before this court at this early pleading stage have specifically placed the following in issue: (a) Whether defendant Haber was acting within the scope of his duties under the Federal Constitution and California law; (b) Whether defendant acted within the range of discretion permitted by the controlling state law; ***[NOTE: The controlling state law here is California Code of Civil Procedure Section 585 Subdivision (b) --not touched upon by any federal court.]*** (c) Whether defendant acted properly in removing plaintiff's submitted trial from submitted status; (d) Whether defendant acted properly as to actions taken in connection with that removal. (See *Scheuer v. Rhodes* (supra) 416 U.S. at 250). The only question before this court at this early pleading stage of the proceedings is whether plaintiff is entitled to offer evidence to prove the above issues in support of his claims." [OB 34:26-35:11].

Plaintiff then concluded the opening brief, "Until the federal court provides the relief necessary as alleged on the face of the complaint, i.e., order the state court to provide the process due under CCP §585(b), he will forever be deprived of a remedy in the underlying state tort action and unable to proceed to finality according to law. [ER 1/11:1-7, 12:7-13]. Dated: February 13, 1994." [OB 35:13-18].

After receiving the disingenuous "MEMORANDUM*" being passed off by the C/A as an appellate decision in this case, plaintiff finally concluded in the petition for rehearing: "Plaintiff presented on appeal the issue of California Code of Civil Procedure Section 585 Subdivision (b) and what effect that statute has on plaintiff's rights according to the facts of this case. That issue forms the gravamen of this federal suit for injunctive relief as Argument #1 states and argues [OB pp.14-20], including the protected liberty interest [OB 16:4], the protected property interest [OB 17:6], and the minimum process due [OB 19:10]. The record shows that the issue was never ruled on or discussed by the federal district court [OB 2:9] and that there are no findings based on the complaint filed in this case [see OB 14:5] though findings were requested [OB 23:25-24:3]. Based on those facts alone, by law the only proper decision the Court of Appeals can make is to remand the matter to the district court for such findings since the appellate court is not a factfinding tribunal, and has no jurisdiction to entertain factfinding. (See *DeMarco v. United States* (1974) 415 U.S. 449, 450; *Pullman-Standard v. Swint* (1982) 456 U.S. 273, 291-2). As the case now stands, the complaint has not been addressed by the federal court, and leaves the underlying state action remaining suspended in limbo without a final remedy as it has been since August 21, 1991. The injunctive relief sought in federal court seeks to compel the state action ***to become*** `ongoing', and complains that it is forever in limbo, going nowhere, which is just why federal intervention is absolute and necessary herein. For the reasons stated in this petition, the "MEMORANDUM*" dated May 13, 1994 is not acceptable as an appellate decision for this appeal. Dated May 21, 1994." [REH 4:8-5:13]. The response by the "Honorable" Court of Appeal: "ORDER - Before: HUG, D.W. NELSON, and FERNANDEZ, Circuit Judges. The petition for rehearing is DENIED." (Filed July 12, 1994). Where is the remedy? The case ***remains*** deadlocked!

It is ***not*** the state judicial proceeding that is ongoing, but the "violation of federal law by a state official" as plaintiff argued in his opening brief [OB 29:22-23]. As long as procedural due process is not provided for defendant Haber's conduct, the deprivation without due process of law ***is perpetual*** and "remedies designed to end a continuing violation of federal law ***are necessary to vindicate the federal interest.***" citing *Papasan v. Allain* (1986) 478 U.S. 265, 277-278. Twenty years from now the same deprivation of due process would be taking place by defendant, to wit, failure to enter the statutorily required default judgment. [OB 29:23-30:1].

The only other factor that is "ongoing" in this case is the great and immediate irreparable harm and injury which plaintiff has suffered and will continue to suffer in the loss of his constitutional rights as a proximate result of the acts and omissions of defendant Haber as alleged in the complaint, in that his underlying state tort action is currently being held in a perpetual state of limbo without a judgment, --i.e., the state action is **NOT ONGOING**. [ER 1/10:21-11:5; OB 10:20-25].

Because of the close-out by the lower courts of access to the federal adjudicatory process and to the adversary proceedings contemplated by the Federal Rules (see *Neitzke v. Williams* (1989) 490 U.S. 319, 330), plaintiff is forced to now bring this entire federal case to the U.S. Supreme Court to receive the process that is still due.

"Certiorari [§1254] may be granted to review decisions that do not dispose of the pending litigation, to examine orders that go merely to procedural steps before the court of appeals, or to decide a case that has not even been considered by the court of appeals." *17 Wright/Miller/Cooper, Federal Practice and Procedure (1988) Juris.2d §4036 p.19.*

"Although we do not ordinarily consider questions not specifically passed upon by the lower court, see *California v. Taylor* 353 U.S. 553, 557 n.2 (1957), this rule is not

inflexible, particularly in cases coming, as this one does, from the federal courts." [citations] *Capital Cities Cable Inc. v. Crisp* (1984) 467 U.S. 691, 697, 104 S.Ct 2694, 2699, 81 L.Ed.2d 580.

"[I]n a variety of circumstances the Court may undertake initial decision of matters that have not been decided below, perhaps because it wishes to reach a preferred ground for disposition, or because of a desire to terminate lengthy proceedings, or simply because the issue seems clear;...." *17 Wright/Miller/Cooper (supra), Juris.2d §4036 pp.39-40.* For instance, "[T]his point is so clear that we see no occasion for remanding the issue to the Court of Appeals for its consideration of the point, even though it be assumed that its opinion does not decide it. Effective judicial administration requires that we dispose of the matter here." *Levin v. Mississippi River Fuel Corp.* (1967) 386 U.S. 162, 170, 87 S.Ct. 927, 932, 17 L.Ed.2d 834.

"Cases arising under the due process protection of interests in `liberty' and `property' provide the richest examples of ***special need for the Supreme Court to protect rights created by state law."*** [emph. added] *16 Wright, Miller, Cooper & Gressman, Federal Practice and Procedure (1977) Juris. §4030, p.758.* Plaintiff's case is such, calling for the special need for intervention by the Supreme Court at this time. See the conclusion of the petition for rehearing, quoted above. [REH 4:8-19].

"The right set up in the bill is one under the Federal Constitution. Whether the [lower] court denied that right or failed to give it due recognition is a question upon which ***the plaintiffs are entitled to invoke the judgment of this Court.*** Our jurisdiction is not affected because the existence of the right for which constitutional protection is claimed depends upon state law." (citing cases) [emph. added] *Fox River Co. v. R.R. Comm.* (1927) 274 U.S. 651, 653-4, 47 S.Ct 669, 71 L.Ed 1279. "[T]he point first to be determined is whether plaintiffs' description [of his rights] is accurate." *Id.* p.654.

That "point first to be determined" in plaintiff's case here is the first issue on appeal, being "What role does California Code of Civil Procedure §585 subdivision (b) play in this federal suit for prospective injunctive relief?" [OB 1:2-3]. That issue was first raised in district court in plaintiff's Opposition to Amended Notice/Motion to Dismiss [ER 11/11:16-12:16, 18:24-19:18, 28:6-14, 29:23-30:6, 31:11-24] and concurrently raised in plaintiff's Declaration in Objection to Request For Judicial Notice [ER 12/3:20-27, 5:6-11, 5:15-28]. The issue was then raised in the Objections to the Magistrate's Report [ER 25/4:18-20, 4:27-5:1, 5:13-14, 6:20-22, 7:10-11, 11:26-27, 13:11-12, 15:24-16:6, 17:13, 32:19-25, 33:10-11]. Next, it was raised in plaintiff's Notice of False Statements in the Final Report of Magistrate and Demand For Magistrate to Rule On Plaintiff's Federally Protected Property Interests [ER 27/2:18-26, 3:11-5:5]. After that, it was raised in plaintiff's Rule 59(e) Motion ***[a key document in this case]*** [ER 31/6:4-9:10, 12:14-21, 13:4-8, 14:21-28, 15:12-16:3, 25:1-27, 26:1-24, 27:18-28:6, 28:8-30:27, 31:14-33:27 ***(especially 33:15-27),*** 39:9-10, 42:26-28, 43:6-44:28]. Then, it was raised in plaintiff's Reply To Frivolous Opposition [ER 34/3:14-4:6, 6:26-27] and concurrently raised in plaintiff's Motion For Sanctions for the frivolous opposition [CR 33/9:2-14, 9:24]. It was then raised in plaintiff's Motion For OSC [CR 36/12:12-16]; then in plaintiff's Motion For Intervention of Article III Judge [ER 43/8:27-28, 12:28-14:15, 19:10-14]. ***THE ISSUE WAS NEVER RULED ON --never discussed by the district court.*** [OB 1:20-2:9].

Argument #1 on this issue is entitled "California Code of Civil Procedure Section 585 Subdivision (b) forms the gravamen of this federal suit." [OB 14:13-14]. The C/A was reminded of that fact in the conclusion of the petition for rehearing, quoted above [REH 4:11-12]. The issue was extensively argued in the opening brief, covering seven pages [OB pp.14-20], specifically arguing "(a) The Protected

Liberty Interest" [OB 16:4-17:5], "(b) The Protected Property Interest" [OB 17:6-19:9], and "(c) The Minimum Process Due" [OB 19:10-20:28], concluding with "At no time did the magistrate or Judge Baird ever mention CCP §585(b), nor was any suggestion made as to what the statute requires, whether it was complied with, or what effect it had on plaintiff's alleged claim. This issue was raised in plaintiff's Rule 59(e) motion which was summarily denied. [ER 31/33:15-27]." [OB 20:24-28].

Quoting that portion raised directly to the attention of the district judge in plaintiff's Rule 59(e) motion: "At no time did the magistrate nor Judge Baird ever mention Code of Civil Procedure §585(b) or §632, nor was any suggestion made as to what those statutes require or whether they were complied with, or what effect those statutes had regarding plaintiff's alleged claim for federal injunctive relief. Because of the magnitude of plaintiff's Objections and the complexity of the issue of plaintiff's constitutionally-protected liberty and property rights alleged in the complaint, plaintiff requests a de novo determination on the record at the oral proceedings on this motion regarding the effect plaintiff's statutory entitlements has on the issue of federal jurisdiction to adjudicate and vindicate those claims of entitlement." [ER 31/33:15-27]. Disposition of the Rule 59(e) motion, discussed in the Statement of Case ***ante***: The magistrate (not the judge) ordered the post-judgment motion off calendar [CR 35; OB 7:6-8]; the district judge later summarily denied the motion [ER 52/8:6-7] and denied the rescheduling of it for hearing and oral argument [ER 52/8:12-13]. [OB 8:11-12].

Disposition of this issue by the C/A:

"1. THE COURT OF APPEALS HAS OVERLOOKED THE ISSUES ON APPEAL IN U.S.C.A. CASE NO. 93-56696. Plaintiff cannot, as a matter of law, accept as an appellate decision of this appeal the presentment of the unsigned document titled `MEMORANDUM*' filed May 13, 1994, by Cathy A. Catterson, Clerk of the U.S.

Court of Appeals, bearing Case No. 93-56696 and D.C. No. CV-92-03544-LGB, before Circuit Judges Hug, D.W. Nelson, and Fernandez,..., in that it does not comply with the terms, conditions, and intent of the Federal Rules of Appellate Procedure, the Ninth Circuit Rules, nor with federal statute. Said document is in breach of the letter and spirit of such Rules and federal statute, is violative of due process of federal law guaranteed and secured by the United States Constitution, and accordingly is void and a nullity as a matter of law.

(Continuing) "On November 23, 1993, plaintiff filed a notice of appeal as offered by and in compliance with Rule 4(a) of the Federal Rules of Appellate Procedure (hereafter "FRAP") invoking the jurisdiction of this Court, paid in full the required fees in compliance with Rule 4(e) FRAP ***[should be Rule 3(e)]*** in the amount of One Hundred Five ($105.00) Dollars, evidenced by USDC Receipt No. 110428, and has scrupulously followed the requirements of the Federal Rules as an appellant in Appeal No. 93-56696....

(Continuing) "In accordance with Rule 28(a)(2) FRAP ***[now 28(a)(3)]*** plaintiff presented his "STATEMENT OF ISSUES FOR REVIEW" which are: `(1) What role does California Code of Civil Procedure §585 subdivision (b) play in this federal suit for prospective injunctive relief?' and `(2) Whether it is impossible for plaintiff to sustain the jurisdiction of the district court in this federal suit for injunctive relief.' [Appellant's Brief (hereafter `APT') 1:1-5 ***(the same as "OB" herein)***]. A reading of the document presented by the Court of Appeals, titled `MEMORANDUM*', reveals that the issues presented on appeal are neither decided nor discussed. In filing the notice of appeal and paying the court fees required for appeal, there was conferred upon plaintiff as a matter of law a reasonable expectation that the Federal Rules and laws would be followed in conducting this appeal.

(Continuing) "Accordingly, in presenting the issues for appellate review in compliance with Rule 28(a)(2) ***[now 28(a)(3)]*** FRAP [APT 1:1-5], plaintiff had a reasonable

expectation that the issues presented, the facts stated with references to the record, and the arguments made with citations of supporting authority in accordance with the Rules would be addressed by the Court of Appeals." [REH 1:9-3:3].

Ironically, the Ninth Circuit has stated "[W]e take the briefs as submitted and limit our review to the issues set forth in the briefs as required by Fed.R.App.P. 28(a)(2)." ***[now 28(a)(3)]*** *Int. Olympic Com. v. San Francisco Arts & Ath.* (9th Cir.1986) 781 F.2d 733, 738 n.1. [emph. added]. Indeed, it is considered a ***waiver of the issues*** if they are not raised in the opening brief. "Failure to raise or discuss issues in the opening brief is deemed a waiver of those issues and they will not be addressed on appeal." *Officers For Justice v. Civil Serv. Com.* (9th Cir.1992) 979 F.2d 721, 726. What happens when they ***are raised***, as they were here? Does the C/A have jurisdiction to ignore them? Not according to *Int. Olympic, etc.* (supra).

Interestingly, the Ninth Circuit did not follow in plaintiff's case the rule of law set forth and established by prior authority, shown above. Yet, contrary to its own policy, also established by prior authority, the decision in plaintiff's case is marked "Not For Publication." The court has stated on this matter: "If our disposition does not establish, alter, modify or clarify a rule of law, because the rule of law is fully and clearly established by prior authority, then we do not publish, where none of the alternative grounds for publication pertain." *In Re Burns* (9th Cir.1992) 974 F.2d 1064, 1068.

There is no "rule of law" in the Ninth Circuit or anywhere else "fully and clearly establish[ing] by prior authority" that the Court of Appeals may, at its option, ***disregard the issues presented in the opening brief.*** Indeed, the decision by the C/A in plaintiff's case ***does*** "establish, alter, modify and clarify a rule of law" previously "established by prior authority," requiring the decision to be published by the Circuit's **own stated policy!** Why wasn't it published? In *County of Los Angeles v. Kling* (1985) 474 U.S. 936, 938,

106 S.Ct 300, 301, 88 L.Ed.2d 277, a case involving the Ninth Circuit, Justice Stevens equated the decision not to publish the decision or permit it to be cited with "the decision to promulgate a rule spawning a body of secret law." Regarding Supreme Court review of unpublished decisions, the Court stated "We note in passing that the fact that the Court of Appeals' order under challenge here is unpublished carries no weight in our decision to review the case. The Court of Appeals exceeded its jurisdiction regardless of nonpublication and regardless of any assumed lack of precedential effect of a ruling that is unpublished." *Commissioner v. McCoy* (1987) 484 U.S. 3,7.

A serious question of deliberate ***evasion*** of plaintiff's rights is raised by the knowing, willful, and intentional ignoring of them by both the district court and the Court of Appeals, as the record abundantly shows in this case. "We are aware that a right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action. If a federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right... as if it had been specifically referred to and the right directly refused." *Chapman v. Goodnow* (1887) 123 U.S. 540, 548, 8 S.Ct 211, 215, 31 L.Ed 235.

"It is a necessary and well settled rule that the exercise of jurisdiction by this Court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights." *Rogers v. Alabama* (1904) 192 U.S. 226, 230, 24 S.Ct 257, 48 L.Ed 417. The *Rogers* Court concluded that it should "inquire in terms whether [the] ground of decision was the real one, or whether it was set up as an evasion and merely to give color to a refusal to allow [the federal claim].... We are of opinion that the federal

question is raised by the record and is properly before us." *Id.* p.231.

In plaintiff's case, the "ground of decision" is stated by the C/A as "Nevertheless, where the injunctive relief requested would require the federal court to supervise ongoing state judicial proceedings, federal courts should refrain from issuing an injunction as a matter of comity. See *Pulliam*, 466 U.S. at 539; *Younger v. Harris*, 401 U.S. 37, 46 (1971)." [MEM 2:2-6]. Applying *Rogers* to plaintiff's case, the same inquiry must be made by the Supreme Court into that ground of decision, whether it "was the real one, or whether it was set up as an evasion and merely to give color to a refusal to allow" plaintiff's federal claim. The deliberate refusal of the C/A to discuss the issues presented in the opening brief and which were fully argued and briefed by plaintiff/appellant, and then base its decision on something other than those issues is self-evident that it indeed ***is an evasion*** and "merely gives color to" the Court of Appeals' refusal to allow the federal claim. Had the issues on appeal been addressed and decided, the counterfeit decision that was presented by the Court of Appeals could not have been made.

The issue of law in this case is whether federal courts can grant prospective injunctive relief ***--not to supervise ongoing state judicial proceedings--*** but to vindicate plaintiff's rights secured by the Constitution, i.e., his legitimate claims of entitlement conferred by state statute as specifically alleged in the complaint. This issue raised by plaintiff's complaint has sufficient merit to warrant the exercise of federal jurisdiction for purposes of adjudicating it based on cases where federal jurisdiction has been sustained in suits for injunctive relief under the *Ex parte Young* doctrine. [ER 25/17:18-24:13; see also ER 22]. [OB 24:23-25:2].

The U.S. Supreme Court has recognized "well settled" and "established practice" to sustain federal jurisdiction to provide whatever remedy is required to vindicate constitutionally protected rights. "[I]t is established practice for this Court

to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution and to restrain individual state officers from doing what the 14th Amendment forbids the State to do." *Bell v. Hood* (1946) 327 U.S. 678, 684. Furthermore "it is ... well settled that where legal rights have been invaded, and a federal statute [e.g., §1983] provides for a general right to sue for such invasion, federal courts may use ***any available remedy to make good the wrong done.*** (citing *Bell v. Hood*, 327 U.S. at 684)." [emph.added]. *Davis v. Passman* (1979) 442 U.S. 228, 245. Also, "[W]here federally protected rights [such as those established by CCP §585(b)] have been invaded ... courts will be alert to ***adjust their remedies*** so as to grant the ***necessary relief.***" (also citing *Bell* p.684). [emph. added] *Duke Power Co. v. Carolina Env. Study Group* (1978) 438 U.S. 59, 71. [OB 25:3-15].

Likewise, in plaintiff's case, the federal court must order the Superior Court to take whatever action is necessary "to make good the wrong done." For that reason, the ancillary effect against the State is necessary when granting appropriate prospective injunctive relief to vindicate federal rights secured by the Constitution. [ER 25/pp.23-24]. [OB 25:16-20]. Moreover, under federal standards, it is the very "wrong done" by defendant Haber that is "what the 14th Amendment forbids the State to do" for which federal jurisdiction for injunctive relief must be sustained, as explained on page 684 of *Bell v. Hood* (supra). [OB 25:26-26:2].

Plaintiff brought this suit for injunctive relief based on his statutory entitlement to default judgment under CCP §585(b) and its deprivation by defendant Haber under ***federal standards*** of due process. Yet the district court ***and the Court of Appeals*** refuse to discuss CCP §585(b), the jurisdictional core of this case. "Once a constitutional violation is found, a federal court is required to tailor `the scope of the remedy' to fit `the nature and extent of the constitutional violation.' *Milliken v. Bradley* (1974) 418 U.S. 717, 744; *Swann v.*

Charlotte-Mecklenburg Board of Educ. (1971) 402 U.S. 1, 16." (citing *Hills v. Gautreaux* (1976) 425 U.S. 284, 293-4). *Dayton Board of Educ. v. Brinkman* (1977) 433 U.S. 406, 419-20. Correction of "the wrong done" is what is required under ***constitutional standards***. [OB 26:12-23].

What happens to "well settled" and "established practice" cases when federal courts deliberately refuse to address "rights secured by the Constitution", "legitimate claims of entitlement conferred by state statute", "what the 14th Amendment forbids the State to do", "an available remedy to make good the wrong done" etc.? All of these citations ***and more*** were in the opening brief, yet knowing that the district court never addressed these matters, the Court of Appeals likewise purposely evaded them.

CONCLUSION

As shown by the record, the federal judicial process in this case is a sham and a mockery of justice. It is treason against the Constitution of the United States (see e.g. *Ex parte Young* (1908) 209 U.S. 123, 143) and plaintiff now calls upon this High Court to act upon its "well settled, established practice" regarding federal injunctive relief and make available the "remedy to make good the wrong done." To do so, the "wrong done" must be discussed and decided by the federal judiciary which hasn't been done yet!

Dated: September 28, 1994

Ronald Branson

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APPENDIX

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* * *

DECISION OF THE NINTH CIRCUIT COURT OF APPEALS

FILED
MAY 13 1994
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RONALD BRANSON, M.D. *[sic]*
Plaintiff-Appellant

v.

ALAN HABER,
Defendant-Appellee.

No. 93-56696
D.C. No. CV-92-03544-LGB

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Lourdes G. Baird, District Judge, Presiding
Submitted May 11, 1994**

Before: HUG, D.W. NELSON, and FERNANDEZ, Circuit Judges

Ronald Branson appeals pro se the district court's dismissal of his 42 U.S.C. §1983 action alleging that Allan *[sic]* Haber, a California Superior Court judge, violated his constitutional rights by setting aside a default judgment against the City of Los Angeles in Branson's on-going state-court action. Branson seeks injunctive relief. We have jurisdiction pursuant to 28 U.S.C. §1291, and we affirm.

Judicial immunity does not bar claims for injunctive relief in section 1983 actions. Pulliam v. Allen, 466 U.S. 522, 541-42

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir.R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed.R.App.P. 34(a); 9th Cir.R.34-4.

(1984); Ashelman v. Pope, 793 F.2d 1072, 1075 (9th Cir.1986) (en banc). Nevertheless, where the injunctive relief requested would require the federal court to supervise ongoing state judicial proceedings, federal courts should refrain from issuing an injunction as a matter of comity. See Pulliam, 466 U.S. at 539; Younger v. Harris, 401 U.S. 37, 46 (1971).

Here, Branson's request for injunctive relief sought to recuse Judge Haber from Branson's state-court action and to have an impartial judge appointed who could render a default judgment in Branson's favor. Because the relief Branson requests would require a federal court to intrude too far into a state court's judicial proceeding, the district court properly dismissed his action. See Pulliam, 466 U.S. at 539. [1/]

AFFIRMED.

[1/] Moreover, the district court did not abuse its discretion by denying Branson's motion to vacate the judgment pursuant to Fed.R.Civ.P. 59(e). See McCarthy v. Mayo, 827 F.2d 1310, 1314 (9th Cir.1987) (denial of a motion for reconsideration under Rule 59(e) reviewed for abuse of discretion).

FINAL ORDER OF DISTRICT COURT

THIS DOCUMENT WAS SERVED BY FIRST-CLASS MAIL ON ALL COUNSEL (OR PARTIES AT MOST RECENT ADDRESS OF RECORD) IN THIS ACTION ON THIS DATE.
DATED_____
By_____
DEPUTY CLERK (signed attst mailing)

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY RULE 77(d).

FILED
OCT 26 1993
CLERK, U.S. DIST.CT.
CENTRAL DIST. OF CALIF.
BY DEPUTY

ENTERED
CLERK, U.S. DIST.CT.
NOV 2 1993
CENTRAL DIST. OF CALIF.
BY DEPUTY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RONALD BRANSON
Plaintiff,
v.
ALAN B. HABER
Defendant.

Case No. CV-92-3544 LGB (EE)x

ORDER

BACKGROUND:

Plaintiff, Ronald Branson, has a suit pending in Superior Court against the City of Los Angeles and various police officers [1/] as a result of plaintiff's arrest and booking for auto burglary. Defendants in the state court proceeding failed to timely answer the complaint. Default was entered against defendants on July 1, 1991, and a default trial was set before California Superior Court Judge Haber. After hearing defendants' motion to set aside default, Judge Haber vacated and set aside the default as to all defendants.

Plaintiff filed a complaint in federal court on June 12, 1992, alleging that Judge Haber violated plaintiff's constitutional rights under 42 U.S.C. §1983. Defendant (Judge

[1/] The officers are Anthony R. Stavropoulos, Patrick Shannon, Sgt. Roger W. Ferguson, Sgt. Joseph Morgan, Det. Larry R. Dolley, Det. Thomas A. Yost, and Lt. Lee Lorenze.

---1---

Haber) filed an amended 12(b) motion to dismiss on June 30, 1992.

All pretrial matters were referred to U.S. Magistrate Judge Edwards on July 9, 1992.

The Magistrate Judge's Report and Recommendation ("R&R"), filed on June 29, 1993, recommended that the 12(b) motion be granted and that the action be dismissed.

On July 19, 1993, Plaintiff filed Objections to the Magistrate's R&R.

On July 26, 1993, the magistrate Judge filed a Final R&R with no modifications to the recommendations made in the original R&R.

On August 4, 1993, this Court adopted the Magistrate's recommendations and entered judgment, dismissing plaintiff's action with prejudice.

POST JUDGMENT PROCEEDINGS:

August 18, 1993: Plaintiff filed a Fed.R.Civ.P. 59(e) motion to alter or amend judgment.

August 19, 1993: This Court referred plaintiff's 59(e) motion to Magistrate Judge Edwards.

August 24, 1993: Defendant (Judge Haber) filed an Opposition to plaintiff's 59(e) motion (asserting that plaintiff's motion had not been filed within 10 days after entry of judgment as required under Rule 59(e).

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Sept. 2, 1993: The Magistrate Judge ordered plaintiff to show cause in writing why his motion should not be stricken as untimely under Rule 59(e) ordered the hearing set for September 20 off calendar.

Sept. 7, 1993: Plaintiff filed a motion for sanctions for defendant's (Judge Haber's) filing of a "frivolous Opposition" to plaintiff's 59(e) motion (correctly pointing out that defendant's *[sic]* 59(e) motion was timely filed under Fed.R.Civ.P. 6(a)).

Sept. 9, 1993: This Court referred plaintiff's motion for sanctions to Magistrate Judge Edwards.

Sept. 10, 1993: Plaintiff filed a motion (1) for an OSC why Magistrate Edwards should not be held in contempt for interfering with the lawful proceedings of the District Court; and (2) to reschedule the Rule 59(e) motion for hearing and oral argument.

Sept. 15, 1993: The Magistrate Judge issued a Minute Order, ordering the hearing that was set for October 18 (re: sanctions) off calendar. The Order stated that plaintiff's September 7 motion

for sanctions was treated as a response to that court's OSC of September 2.

Sept. 22, 1993: Plaintiff filed a motion (1) fo intervention of Art.III Judge into the Rule 59(e) post-judgment motion proceedings; and (2) for placing the motion for sanction back on calendar for hearing.

Sept. 27, 1993: The Magistrate Judge filed a R&R regarding plaintiff's 59(e) motion and plaintiff's motion for sanctions. [2/]

I. Motion for Intervention

On September 22, 1993, plaintiff filed a motion for intervention of an Article III judge into the plaintiff's Fed.R.Civ.P. 59(e) post judgment motion proceedings.

If the parties do not consent to the magistrate's exercise of plenary authority, that officer's power is confined to the

[2/] Under Rule 3.1 of the Local Rules Governing Duties of magistrates, a copy of the Magistrate Judge's R&R is filed with the clerk and served on the parties. The parties then have the opportunity to submit specific objections to the R&R. Id. The Magistrate will then consider the objections and, if appropriate, revise the R&R. Id. It is at this point that the R&R is forwarded to the district court for consideration. Id. In the instant case, the R&R regarding plaintiff's 59(e) motion and plaintiff's motion for sanctions was never submitted to this Court for consideration.

authority granted by 28 U.S.C. §636(b)(1).[3/] Reynaga v. Cammisa, 971 F.2d 414, 416 (9th Cir.1992). 28 U.S.C. §636(b)(1) "only concerns pretrial matters and some criminal proceedings" and therefore does not authorize the magistrate's participation in the instant post-judgment proceedings. Columbia Record Productions v. Hot Wax Records, Inc., 966 F.2d 515, 516 (9th Cir.1992). [4/]

Therefore, this Court GRANTS plaintiff's motion for

[3/] 28 U.S.C. §636(b)(1) reads:

Notwithstanding any provision of the law to the contrary–

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss for failure to state a claim upon which relief can be granted, and to involuntary [sic] dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to the judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

[4/] In Columbia, defendant filed a Rule 60(b) motion with the district court, seeking relief from the magistrate judge's post judgment assignment order. The Ninth Circuit concluded that the magistrate judge lacked the authority to enter the order. Columbia Record Productions v. Hot Wax Records, Inc., 966 F.2d 515, 516 (9th Cir.1992).

intervention of an Article III judge into the plaintiff's Fed.R.Civ.P. 59(e) post judgment motion proceedings.

Magistrate Edwards' participation in these proceedings is hereby terminated. This Court has not considered, and will not in the future consider, Magistrate Edward's Report and recommendation regarding plaintiff's Fed.R.Civ.P. 59(e) motion.

II. Motion for Order to Show Cause

On September 10, 1993, plaintiff filed a motion for an order to show cause as to why Magistrate Edwards should not be held in contempt for interfering with the lawful proceedings of the District Court.

Plaintiff's motion is based on "the magistrate's unauthorized interference with the motion procedure and usurpation of power." Plaintiff's Motion for OSC 2:12-13.

While Magistrate Edwards' post judgment activity is in violation of 28 U.S.C. §636, this activity was authorized by Judge Baird. There was no misbehavior or disobedience on the part of magistrate Edwards that would warrant a finding of contempt. 18 U.S.C. §401.[5/]

[5/] 18 U.S.C. §401 states:

A court of the United States shall have the power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as–

(1) Misbehavior of any person in its presence or as near thereto as to obstruct the administration of justice;

Therefore, this Court DENIES plaintiff's motion for an order to show cause as to why Magistrate Edwards should not be held in contempt for interfering with the lawful proceedings of the District Court.

III. Motion to Alter or Amend Judgment

On August 18, 1993, plaintiff filed a Fed.R.Civ.P. 59(e) motion to alter or amend the judgment.

Plaintiff asserts that this Court failed to conduct a de novo review of the magistrate's R&R regarding defendant's (Judge Haber's) 12(b) motion before dismissing plaintiff's action.[6/]

In support of plaintiff's position that there was no de novo review of the Magistrate's R&R regarding defendant's 12(b) motion prior to the dismissal of plaintiff's action, plaintiff argues (1) that there was no indication in the "Order Adopting" the R&R that a de novo determination was made; and (2) that a de novo review of the R&R in light of plaintiff's objections could not

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(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

6/ "28 U.S.C. §636(b)(1) and Article III of the Constitution require that the district court make a de novo review of the magistrate's report and recommendations." Thornton v. Jennings, 819 F.2d 153, 154 (6th Cir.1987). "The district court must decide for itself whether the magistrate's report is correct. Without this judicial review, the magistrate's performance of the inherently judicial act of granting a motion to dismiss would be constitutionally suspect." Britt v. Simi Valley Unified School District, 708 F.2d 452, 454 (9th Cir.1983).

legally support a dismissal of plaintiff's action.7/

This Court made a de novo review of the Magistrate's R&R regarding defendant's 12(b) motion, and of plaintiff's objections, before entering judgment dismissing plaintiff's claim. There is nothing more for this Court to consider. Thus, plaintiff's Fed.R.Civ.P. 59(e) motion to alter or amend judgment is DENIED.

On September 10, 1993, plaintiff filed a motion to reschedule the Fed.R.Civ.P. 59(e) motion for hearing and oral argument.

Based upon the analysis supra, plaintiff's motion to reschedule the Fed.R.Civ.P. 59(e) motion for hearing and oral argument is DENIED.

IV. Motion for Sanctions

On September 7, 1993, plaintiff filed a motion for sanctions for defendant's (Judge Haber's) filing of a "frivolous opposition" to plaintiff's Fed.R.Civ.P. 59(e) motion.

Defendant's opposition to plaintiff's 59(e) motion contained the assertion that plaintiff's motion was untimely under Fed.R.

7/ Plaintiff accuses Magistrate Edwards of being dishonest in making his R&R to this Court, and even goes so far as to say that Magistrate Edwards, "in league with Assistant County Counsel Frederick Bennett, [is] doing whatever [he] can to prevent plaintiff" from prevail *[sic]* in federal court. Motion for Intervention 2:16-19; 7:26-8:1.

Civ.P. 59(e).[8/] In fact, plaintiff's motion was timely filed under Fed.R.Civ.P. 6(a).[9/]

Rule 11 provides that sanctions are appropriate if defendant's counsel fails to satisfy the objective standard of reasonableness. Golden Eagle Distrib. Corp. v. Burroughs Corp., 801 F.2d 1531 (9th Cir.1986). "The `reasonable man' against which conduct is tested is a competent attorney admitted to practice before the district court." Zaldivar v. City of Los Angeles, 780 F.2d 830 (9th Cir.1986).

Plaintiff has established that defendant's opposition lacked legal support. Thus, the issue is whether defendant performed sufficient legal research to satisfy the reasonableness standard. Since the Magistrate made the same mistake in issuing the OSC regarding timeliness of the motion, it appears that a reasonable attorney before the district court could well have made the same mistake.

Therefore, plaintiff's motion for sanctions is DENIED.

On September 22, 1993, plaintiff filed a motion to place plaintiff's motion for sanctions back on calendar for hearing.

[8/] Fed.R.Civ.P. 59(e) reads: "A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

[9/] Fed.R.Civ.P. 6(a) states, in pertinent part:

When the period of time prescribed or allowed by the [Federal Rules of Civil Procedure] is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

The former Fed.R.Civ.P. 6(a) (before being amended in 1985) did not provide for the exclusion of intervening Saturdays and Sundays.

Based on the analysis supra, plaintiff's motion to place plaintiff's motion for sanctions back on calendar for hearing is DENIED.

IT IS SO ORDERED.

DATED: October 26, 1993 /s/_____

LOURDES G. BAIRD
United States District Judge

DENIAL OF REHEARING

FILED
JUL 12 1994
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RONALD BRANSON, M.D., *[sic]* No. 93-56696
Plaintiff-Appellant, D.C. No. CV-92-03544-LGB

v.

ALAN HABER, ORDER
Defendant-Appellee.

Before: HUG, D.W. NELSON, and FERNANDEZ, Circuit Judges

The petition for rehearing is DENIED.

BRIEF FOR APPELLANT (Opening Brief)
Cover and page 1 only
(identifying the issues presented for appeal)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Case No. 93-56696

RONALD BRANSON,

Plaintiff and Appellant

vs.

ALAN B. HABER,
in his personal capacity only,

Defendant and Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
Honorable LOURDES G. BAIRD, District Judge
No. CV 92-3544-LGB

BRIEF FOR APPELLANT

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(Page 1 of Opening Brief)

I. STATEMENT OF ISSUES FOR REVIEW (FRAP 28(a)(2))

(1) What role does California Code of Civil Procedure §585 subdivision (b) play in this federal suit for injunctive relief?

(2) Whether it is impossible for plaintiff to sustain the jurisdiction of the district court in this federal suit for injunctive relief.

II. STATEMENT OF JURISDICTION (Cir.Rule 28-2.2)

(a) The statutory basis of subject matter jurisdiction of the district court is Title 28 U.S.C. §1343(a)(3). [CR 1/2:23-25].

(b) Appealability is established by Judgment entered 8/4/93 and post-judgment Order entered 11/2/93 denying the Rule 59(e) motion.

(c) Appellate jurisdiction is invoked under Title 28 U.S.C. §1291.

(d) Final Judgment was entered 8/4/93; the post-judgment Order denying the Rule 59(e) motion was entered 11/2/93; notice of appeal filed 11/23/93. This appeal is timely under FRAP 4(a)(4).

III. REVIEWABILITY AND STANDARD OF REVIEW (Cir.Rule 28-2.5)

(1) The role of California Code of Civil Procedure §585 subdivision (b) in this federal suit for injunctive relief.

This issue was first raised in plaintiff's Opposition to Amended Notice/Motion to Dismiss [CR 11/11:16-12:16, 18:24-19:18, 28:6-14, 29:23-30:6, 31:11-24] and concurrently raised in Plaintiff's Declaration in Objection to request for Judicial Notice [CR 12/3:20-27, 5:6-11, 5:15-28].

The issue was then raised in the Objections [CR 25/ 4:18-20, 4:27-5:1, 5:13-14, 6:20-22, 7:10-11, 11:26-27, 13:11-12, 15:24-16:6, 17:13, 32:19-25, 33:10-11]. Next, the issue is raised in plaintiff's Notice of False Statements in the Final Report and Demand for Magistrate to Rule on Plaintiff's Federally Protected Property Interests [CR 27/2:18-26, 3:11-5:5].

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PERTINENT TEXT OF CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

U.S. Constitution:

Article III, Section 1: The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Article III, Section 2, Clause 1 (pertinent part): The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; ....

Due Process Clause, Fourteenth Amendment: ...[N]or shall any state deprive any person of life, liberty, or property, without due process of law;....

Federal Statutes:

28 U.S.C. §636(b)(1): Notwithstanding any provision of law to the contrary--

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in

subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommend the matter to the magistrate with instructions.

28 U.S.C. §1254(1): Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. §1343(a)(3): (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: ... (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

42 U.S.C. §1983 (pertinent part): Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress....

Federal Rules of Appellate Procedure:

Rule 3(e): Upon the filing of any separate or joint notice of appeal from the district court, the appellant shall pay to the clerk of the district court such fees as are established by statute, and also the docket fee prescribed by the Judicial Conference of the United States, the latter to be received by the clerk of the district court on behalf of the court of appeals.

Rule 4(a) (pertinent part): Appeal in a Civil Case.

[Prior to December 1, 1993]

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of the entry of the judgment or order appealed from; ....

...

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: ... (iii) under Rule 59 to alter or amend the judgment, ... the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. ...

Rule 28(a)(3) [formerly 28(a)(2)]: (a) Appellant's Brief. The brief of the appellant must contain, under appropriate headings and in the order here indicated: ... (3) A statement of the issues presented for review.

Federal Rules of Civil Procedure:

Rule 59(e): A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

California Statutes:

Code of Civil Procedure, Section 585(b) (pertinent part):

... [T]he court shall hear the evidence offered by the plaintiff, and shall render judgment in his or her favor for such sum (not exceeding the amount stated in the complaint), as appears by such evidence to be just. ...

Code of Civil Procedure, Section 632 (pertinent part):

...The court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial. ...

California Rules of Court:

Rule 232:

(a) [Announcement and service of tentative decision; modification] On the trial of a question of fact by the court, the court shall announce its tentative decision by an oral statement, entered in the minutes, or by a written statement filed with the clerk. Unless the announcement is made in open court in the presence of all parties who appeared at the trial, the clerk shall forthwith mail to all parties who appeared at the trial a copy of the minute entry or written tentative decision.

The tentative decision shall not constitute a judgment and shall not be binding on the court. If the court subsequently modifies or changes its announced tentative decision, the clerk shall mail a copy of the modification or change to all parties who appeared at the trial.

The court in its tentative decision may (1) state whether a statement of decision, if requested, will be prepared by the court or by a designated party, and (2) direct that the tentative decision shall be the statement of decision unless within ten days either party specifies controverted issues or makes proposals not covered in the tentative decision.

(b) [Proposals following request for statement of decision (Code Civ.Proc. §632)] Any proposals as to the content of the statement of decision shall be made within 10 days of the date of request for a statement of decision.

(c) [Preparation and service of proposed statement of decision and judgment] If a statement of decision is requested, the court shall, within 15 days after the expiration of the time for proposals as to the content of the statement of decision, prepare and mail a proposed statement of decision and a proposed judgment to all parties who appeared at the trial, unless the court has designated a party to prepare the statement as provided by subdivision (a) or has, within 5 days after the request, notified a party to prepare the statement. A party who has been designated or notified to prepare the statement shall within 15 days after the expiration of the time for filing proposals as to the content of the statement, or within 15 days after notice, whichever is later, prepare, serve and submit to the court a proposed statement of decision and a proposed judgment. If

the proposed statement of decision and judgment are not served and submitted within that time, any other party who appeared at the trial may: (1) prepare, serve and submit to the court a proposed statement of decision and judgment, or (2) serve on all other parties and file a notice of motion for an order that a statement of decision be deemed waived.

(d) [Objections to proposed statement of decision] Any party affected by the judgment may, within 15 days after the proposed statement of decision and judgment have been served, serve and file objections to the proposed statement of decision or judgment.

(e) [Preparation and filing of written judgment when statement of decision not requested] ***(Not applicable here)***

(f) [Hearing] The court may order a hearing on proposals or objections to a proposed statement of decision or the proposed judgment if a statement of decision is not required.

(g) [Extension of time; relief from noncompliance] The court may, by written order, extend any of the times prescribed by this rule and at any time prior to the entry of judgment may, for good cause shown and on such terms as may be just, excuse a noncompliance with the time limits prescribed for doing any act required by this rule.

(h) This rule does not apply if the trial was completed within one day.

California Constitution:

Article VI, Section 19 (pertinent part): ...A judge of a court of record may not receive the salary for the judicial office held by the judge while any cause before the judge remains pending and undetermined for 90 days after it has been submitted for decision.

* * *